

EMPLOYEE REPRESENTATION OUTSIDE THE LABOR ACT: THOUGHTS ON ARBITRAL REPRESENTATION, GROUP ARBITRATION, AND WORKPLACE COMMITTEES

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The social malady (as I think it) of stark decline in union representation in the private sector has been matched by a reciprocal rise in academic prescriptions for a cure. “[W]e suffer,” Sanford Jacoby wrote eight years ago, “an embarrassment of riches” in that regard.¹ “What is needed, frankly,” he went on, “is less imagination and more practicality.”² Are there practicable, even if modest, remedial means more or less ready on hand?

In exploring what these might be, we are assisted by Richard Freeman and Joel Rogers’s *WHAT WORKERS WANT*,³ which surveys felt, but unmet needs, and the means to fill them. First, employees feel the need for greater protection of their legal rights in the workplace;⁴ and second, employees differentiate between those subjects where they believe collective voice is needed and those matters they would rather take up with their employers on an individual basis.⁵ On the former, over eighty percent of the employees responding thought that arbitration was a good or very good way to resolve employment disputes over legal rights.⁶ On the latter, eighty-five percent thought that workplace committees were a desirable way of policing “compliance with legal workplace standards, such as occupational health

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1. Sanford Jacoby, *Reflections on Labor Law Reform and the Crisis of American Labor*, in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 215, 223 (Matthew Finkin ed., 1994).

2. *Id.*

3. RICHARD FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (1999).

4. *Id.* at 127-132.

5. *Id.* at 53-56.

6. *Id.* at 133-135.

and safety regulations,”⁷ among others.

The former finding comes at a time when the United States Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*⁸ and *Circuit City Stores, Inc. v. Adams*,⁹ has given the green light to the subsumption of all labor protective law, statutory and judge-made, federal and state, into unilateral employer-promulgated arbitration systems. The latter directs attention to existing statutory systems providing for workplace safety committees as part of state occupational health and safety, or workers’ compensation law, and which, for the most part, has been unimplemented outside of unionized workplaces.¹⁰ Both are potential portals of union entry into the firm; they point to the possibility of employee representation outside the structure of the NLRA.

I. THE UNION ROLE IN NON-UNION ARBITRATION SYSTEMS

The United States Supreme Court has made clear that the Federal Arbitration Act extends to form (or “boilerplate”) contractual provisions requiring the employee, as a condition of employment, to submit virtually all federal and state statutory and common law claims to an arbitration system promulgated unilaterally by the employer. (Set out below is one such provision used by a division of the Circuit City company, applicable to an inventory clerk, termed an “Associate.”¹¹) The result is argued for by the fact that whereas well paid, mostly managerial or professional employees have little difficulty in securing counsel and pursuing their legal rights (as may lower wage workers whose claims may implicate large

7. *Id.* at 136.

8. 500 U.S. 20 (1991).

9. 532 U.S. 105 (2001).

10. David Weil, *Mandatory Safety and Health Committees: Lessons from the States*, in PROCEEDINGS OF THE 47TH ANNUAL MEETING OF THE IRRRA 273 (Paula Voos ed., 1995).

11. The Company’s “Dispute Resolution Rules and Procedures” provide in pertinent part:

All . . . Associate claims arising under federal, state or local statutory or common law shall be subject to arbitration [under the procedure set out in the Company’s Rules]. Merely by way of example, these claims include, but are not limited to, claims arising under the Age Discrimination in Employment act (ADEA), Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, as amended, . . . state discrimination statutes, state statutes and/or common law regulating employment termination, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/ negligent infliction of emotional distress or defamation.

Quoted in Etokie v. Carmax Auto Superstores, Inc., 133 F. Supp. 2d 390, n.1 at 391 (D. Md. 2000).

damage awards), low wage workers with small or weak claims tend largely to be lost in the current litigation system.¹² Accordingly, in promulgating these arbitration plans, corporate employers have been said, in effect, to offer the state a bargain, a bargain the U.S. Supreme Court has now accepted:

If the state will stay its judicial hand, the welfare corporation will unburden the state's courts by requiring its employees to arbitrate their legal claims. In this way, the jury—which is thought to be, if not biased against faceless corporations (with deep pockets), at least fickle—is eliminated. In return for greater predictability, a lessening of the potential for big damage awards, and the elimination of nuisance (or “strike”) suits and of public litigation (with the attendant possibility of bad publicity), the corporation will make it practicable to hear cases that otherwise would have gone unheard.¹³

The result for the moment is a system of “silent barter”:¹⁴ of corporations instituting these plans, sometimes with conditions biased in their favor, and of the courts deciding in response what the minimum requirements of due process are that these plans must afford to permit them to sweep in public law.¹⁵ Note, for example, some of the features of Circuit City's Dispute Resolution Rules and Procedures that have been or are being litigated: (1) the arbitrator has no power to hear class actions which, the company opined, disallows participation in a class action brought judicially or before an arbitrator; (2) the limitations period to pursue a claim is one year; (3) discovery is limited; (4) back pay is limited to one year; (5) front pay is limited to 24 months; (6) punitive damages are limited to an amount equal to the monetary award or \$5,000, whichever is greater; and, (7) the costs of arbitration will be shared equally.¹⁶

The legal theory sustaining the U.S. Supreme Court's reasoning is that an agreement to arbitrate only substitutes one forum for another in

12. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

13. Matthew Finkin, *Modern Manorial Law*, 38 INDUS. REL. 127, 132 (1999). The term “welfare corporation” is used in reference to SANFORD JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997).

14. *Id.*

15. Harry Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999).

16. *Ramirez v. Circuit City Stores, Inc.*, 90 Cal. Rptr. 2d 916 (Cal. App. 1999) (review granted) (discussing Circuit City Dispute Resolution Rules and Procedures); *Etokie v. Carmax Auto Superstores, Inc.*, *supra* note 11, at 392 (discussing Circuit City cost sharing, where defendant was a Circuit City store). See also *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, n.5 at 681 (8th Cir. 2001) (stating that Circuit City had affirmed that it no longer limited the arbitral capacity to award all the relief available at law).

application of the same legal standard. Two consequences flow directly from this. First, all the procedures applicable in civil litigation do not, without more, necessarily apply in an arbitration. I.e., the substitution of one forum for another works as well to substitute that forum's process for the other's—so long, that is, as due process is afforded. Indeed, one of the reasons employers find arbitration attractive is that it is arguably less expensive and less time-consuming—which means less formal and exacting—than civil litigation. Were procedural substitution not an element of forum substitution, one purpose of effecting a substitution would be negated.

Second, because the arbitrator substitutes for the public tribunal, and stands, so-to-speak, in its stead, he or she functions as a quasi-public actor, a “mini-magistrate” in the sphere of vindicating public law; whence the rich debate over the proper scope of judicial review here in contrast to the minimal review of arbitral contractual conclusions, in which the arbitrator is almost completely a creature of the parties.¹⁷ It follows that the arbitrator, as “mini-magistrate,” has greater authority over the process than is the case where he or she functions as an adjudicator of private goods; this consequence will be developed more fully below.

From the theory of “forum substitution,” it further follows that in order to claim judicial deference, an arbitration system must allow the same access, measure of protection, and remedies that a court could afford. By this light, greater restrictions on damages, limitations periods, and provisions for cost-sharing¹⁸ than those countenanced in the courts should render those elements of a would-be arbitration system unenforceable.¹⁹ Other procedural constraints, such as limits on discovery and denial of class action availability, may have to be treated less categorically. Discovery has been widely discussed and the developing consensus is that the question devolves into one of case-by-case, fact-specific application;

17. See, e.g., Martin Malin and Robert Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993); Robert Gorman, *The Gilmer Decision and the Private Arbitration of Public Disputes*, 1995 U. ILL. L. REV. 635 (1995); Robert Covington, *Employment Arbitration after Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998).

18. See *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000), (holding that although large arbitration costs could preclude a person subject to the agreement effectively from vindicating her federal statutory rights, the party seeking to avoid arbitration on that ground bore the burden of proving that the costs were excessive). But see *Perez v. Globe Airport Security Servs., Inc.*, 253 F.3d 1280, 1285-86 (11th Cir. 2001) (holding that arbitration agreement covering Title VII that required employee to share the costs of arbitration equally with the employer is unenforceable under *Green Tree Financial*).

19. See generally Martin Malin, *Privatizing Justice But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001).

that is, an arbitrator must have the authority to authorize some discovery if fundamental fairness is to be afforded, depending upon the claim at stake, but the scope of discovery need not, as a matter of routine, be coterminous with that of the Federal Rules of Civil Procedure.²⁰ The question of class and group actions—of collective access to the substituted forum—has not been so widely commented on and will be examined momentarily.

Suffice it to say, it is beyond cavil that in order to be worthy of judicial deference the arbitration system has to provide for the individual employee's right to be represented by any counsel or representative of his or her choosing: the *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*,²¹ agreed to by leaders of the Labor and Employment Law Section of the American Bar Association, the American Arbitration Association, the National Academy of Arbitrators, and the Federal Mediation and Conciliation Service, among others, provides that any such arbitration procedure should specify the right of representation and include reference, *inter alia*, to representation by trade unions; the American Arbitration Association's *National Rules for the Resolution of Employment Disputes*²² require that any party be allowed to be "represented by counsel or other authorized representative;" and unions have specifically been urged by thoughtful observers to provide a low cost legal insurance program to employees of non-unionized enterprises.²³ Unions have staff and lawyers throughout the country with considerable experience and sophistication in representing employees in arbitration and who are fully conversant with the law; they can offer these specialists at a reasonable cost to employees looking for help. Moreover, a union presence, as part of an ongoing program policing the employer's adherence to law via its own arbitration system, would eliminate one of the major criticisms of such systems, i.e., that they are inherently biased in favor of employers who are "repeat players" in the process.²⁴ The union would also

20. *Id.* at 613-615.

21. Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (1995), at <http://www.naarb.org/protocol.html>.

22. American Arbitration Association, *National Rules for the Resolution of Employment Disputes*, at <http://www.adr.org/index2.1.jsp>. See, e.g., *Craig v. Brown & Root, Inc.*, 100 Cal. Rptr. 2d 818 (Ct. App. 2000) (company arbitration plan allows representation by independent counsel and permits partial coverage for attorney fees under company legal insurance plan).

23. John T. Dunlop & Arnold M. Zack, *Mediation of Employment Disputes*, at <http://www.ilr.cornell.edu/alliance/DunlopZack%20speech.htm> (last visited April 2, 2002). They also point to this representation as a possible step toward unionization.

24. Compare Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW

serve as a monitor of arbitration-appointing agencies whose decisions to list and, more importantly, to appoint off those lists to the panels sent out for the parties' arbitral selection, are often overlooked as a critical element of the system.²⁵

In other words, when an employer establishes an arbitration system to sweep in public law, it necessarily invites employee organizations to be partners in the process; indeed, they cannot be kept out.²⁶ The remaining questions concern the scope of that participation, and of the practicality of providing it.

A. *The Scope of Arbitral Representation: Class Actions and Group Claims*

Where the members of a putative class, sought to be represented as such in a civil proceeding brought by a class representative, have each previously agreed to substitute an arbitral for the judicial forum for the resolution of future disputes, including the claim now in question, it would seem to follow that the judicial forum would be precluded for them.²⁷ Such would seem to be the inexorable logic of the theory of forum substitution. What remains to be seen, however, is whether the class action could proceed in the arbitral forum. This is a significant question to the extent it bears on the union's ability to aggregate claims for more efficient and effective representation.

The U.S. Supreme Court's sole pronouncement is in *Gilmer v. Interstate/Johnson Lane Corp.*²⁸ The argument was made that an arbitration system should not be permitted to sweep in Age Discrimination in Employment Act (ADEA) claims because the arbitral procedure did not provide for class actions, as did the ADEA. The Court noted that the arbitration system's rules did provide for "collective proceedings" but,

YORK UNIVERSITY'S 53RD ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed., 2001), with Estreicher, *supra* note 12, at 565-566 (2001).

25. See Martin Malin, *supra* note 19, at 607.

26. Professor Estreicher, who later represented Circuit City before the U.S. Supreme Court, has argued that as to the enforcement of an arbitration procedure vis-à-vis claims not implicating public law, the employer is free to condition it as it will, presumably allowing it to limit employee representation. See Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 770-772 (1990). That may or may not be so. See Matthew Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions"*, 66 CHI.-KENT L. REV. 799, 810-812 (1990). Suffice it to say, this essay is concerned only with the arbitration of public law claims.

27. This proposition speaks not at all to the role of enforcement sought by a public agency. See *EEOC v. Waffle House, Inc.*, ___ U.S. ___, 122 S. Ct. 754 (2002); *Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628 (S.D. W.Va. 2001) (discussed in note 46, *infra*); *Carter v. Countrywide Credit Indus., Inc.*, 189 F. Supp. 2d 606 (N.D. Tex. 2002).

28. *Supra* note 8.

quoting from Judge Becker's dissent in another case, it noted also that even if an arbitration could not go forward as a "class action," "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."²⁹ The Court dwelt no further on the matter.

It is impossible to fathom what the Court had in mind here. Once the verbal fog has lifted, one sees that the Court declined to opine that arbitral rules may preclude a "class"—or "collective"—arbitration when such was sought; however, neither did it say that they may not.³⁰

A source of the confusion may lie in the fact that the ADEA's remedial scheme borrows section 16(b) of the Fair Labor Standards Act (FLSA)³¹, which purports to provide for a "class action," but which, in effect, only provides for a form of group action. If the two are disaggregated, it might be possible to resolve the status of section 16(b) in arbitrated FLSA cases, which resolution may also point the way for the solution to the larger class action conundrum.

A class action draws its sustenance from Rule 23 of the Federal Rules of Civil Procedure.³² Rule 23(a) provides in pertinent part:

One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.³³

Note that a court is called upon to decide whether or not all of these conditions are met for the class sought to be certified, regardless of whether plaintiff participation in the class is on an "opt out" or "opt in" basis, and, if all the conditions are not met, whether they would be met for one or more sub-classes. It is often a lengthy, complex, and exacting procedure.

Section 16(b) of the FLSA provides for suits by employees to collect unpaid minimum wages or unpaid overtime plus liquidated damages. Section 16(b) provides in pertinent part:

29. *Id.* at 32, quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting).

30. Mr. Gilmer had not been thwarted in an effort to present a class claim—indeed he made no such claim—and so the Court's treatment of the argument is dictum. Nevertheless, some courts have read *Gilmer* to authorize the arbitration of FLSA and ADEA claims despite the inability of complainants to bring class actions in the arbitral forum. See *Carter v. Countrywide Credit Indus., Inc.*, 189 F. Supp. 2d 606, 611, n.6 at 618 (N.D. Tex. 2002). Respectfully, that is a far too-generous reading of *Gilmer*.

31. 29 U.S.C. § 16(b) (1999).

32. FED. R. CIV. P. 23(a).

33. *Id.*

An action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.³⁴

Note that in both federal and state law it is possible—and, indeed, common—for a group of employees with a common claim to join as named plaintiffs in a single lawsuit represented by a common counsel who functions as the group's representative. But Section 16(b) not only precludes the application of Rule 23 in FLSA (and ADEA) cases, it also precludes unions from serving as a named plaintiff on behalf of the others in such cases.³⁵ That, however, is as far as section 16(b) goes,³⁶ for the union is free to instigate a section 16(b) group action, finance it, and furnish it with counsel.³⁷ In other words, although section 16(b) precludes Rule 23 actions and precludes unions from serving as a named group representative, it accomplishes these ends by substituting a form of group recourse that was otherwise available. Consequently, the United States Supreme Court has made plain that it is proper, even necessary, for the courts to achieve that statutory purpose by authorizing notice to all those who might be situated such as to join the action as a signatory plaintiff, if they desire.³⁸ What may happen after notice is requested was described by the Fifth Circuit as a two-step approach:

The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members.

Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. . .

34. *Supra* note 31.

35. *Id.*

36. *Arrington v. Nat'l Broadcasting Co.*, 531 F. Supp. 498, 503 (D.D.C. 1982).

37. *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 143, 144-45 (4th Cir. 1992).

38. *See Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). *See also Realite v. Ark Restaurant Corp.*, 7 F. Supp. 2d 303 (S.D.N.Y. 1998); *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997); *Belcher v. Shoney's, Inc.*, 927 F. Supp. 249 (M.D. Tenn. 1996).

The second determination is typically precipitated by a motion for “decertification” by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial.³⁹

Though the latter proceeding may require a weighing of several factors, the touchstone—whether or not each of the named individuals who have opted in are similarly situated vis-a-vis the common claim—is considerably less complicated or nuanced than is the weighing of the four factors in a Rule 23 class certification. It is enough if the plaintiffs identify a common policy, practice, plan or decision that violates the law, that the potential defenses will pertain to the plaintiffs as a whole, and that the advantages of a collective action—lower costs, pooled resources and efficient case management—apply.⁴⁰

With this as background, let us return to the arbitral class action conundrum. There is a powerful argument to be made that an employer may not totally eliminate the availability of a Rule 23-like proceeding in its arbitration system to the extent that that device would conduce toward the more effective presentation of group claims. Where, for example, an employer sets out the agreement to submit any legal claim arising out of employment or the denial of employment in its application for employment, the ability of a disappointed applicant to bring a class-based claim of, say, sex discrimination in hiring, may prove crucial to the effective implementation of the law. Weighed against that, however, two considerations counsel caution. First, Rule 23 assumes extensive discovery and imports a complex and often protracted procedure of class certification requiring a weighing of the evidentiary support for each of the questions a court would be called on to decide—of numerosity, commonality, typicality, adequacy and fairness. This procedure conflicts with the idea of arbitration as less exacting and more expeditious than civil litigation. Second, and closely related, there are very practical problems of whether the arbitral process (and arbitrators) are equal to the case management burdens a Rule 23-like procedure would require.⁴¹

39. *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995), *citing* *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *vacated in part and modified on other grounds*, 122 F.R.D. 463 (D.N.J. 1988).

40. *See* *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409-410 (W.D. Pa. 2000) (rehearing the law). *See also* *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 518-19 (D. Md. 2000); *Hyman v. First Union Corp.*, 982 F. Supp. 1, 7-8 (D.D.C. 1997) (illustrating the benefits of collective action).

41. *See* Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) (discussing the potential

However the true class action conundrum is resolved, for two reasons the availability of an arbitral group action, and of the arbitral role in facilitating it, is another matter entirely. First, the logic of “forum substitution” that authorizes the arbitrator to give all that a court could give under the underlying statute necessarily includes the specific procedural components the legislature has attached for the better vindication of the specific statutory right. This means that “opt in” group participation should be available in the arbitral presentation of FLSA, ADEA, or cognate claims; this also means that the arbitrator should be authorized to order class notice in those cases.

Second, and unlike the arbitral role in a Rule 23-like class proceeding, there is no reason to be skeptical of the suitability of the arbitral process to manage such a group action: An arbitral order requiring the employer to produce a list of current and prior employees is as easily executed as a subpoena; the arbitral role in authorizing the “opt in” notice is relatively ministerial; and, the second stage class certification (or decertification) determination—of whether particular persons seeking to join as named claimants are “similarly situated”—is no more and, perhaps, far less complicated than any number of other, often fine-tuned comparative determinations arbitrators are accustomed to making, for example, in job classification, wage and hour, seniority and job bidding cases, work assignment and union jurisdictional disputes, and a host of like comparative judgments called for in public sector interest disputes.⁴² Nor are arbitrators at all unfamiliar with “group” or “class” grievances under collective bargaining agreements.⁴³ I.e., both the arbitral process and experienced arbitrators are quite competent to decide who is sufficiently similarly situated to join in a common claim and to manage the disposition of it.

Accordingly, there is no reason why the arbitral facilitation of group claims should not be generally available, as a component of the arbitral process. Absent a statutory constraint like section 16(b), a union is able to sue as a named class representative to vindicate labor protective law under both federal⁴⁴ and state law.⁴⁵ The theory of “forum substitution” may permit an employer to preclude that role (and, in light of section 16(b), one would be hard pressed to argue that that preclusion would deny

procedural problems).

42. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 399-400 (5th ed. 1997).

43. *Id.*

44. *See, e.g.,* *UAW v. LTV Aerospace and Defense Co.*, 136 F.R.D. 113, 123-25 (N.D. Tex. 1991)(demonstrating the applicable federal law).

45. *See, e.g.,* *Local 1035, IBT v. Pepsi-Cola Allied Bottlers, Inc.*, 83 F. Supp. 2d 301, 304 (D. Conn. 1999) (under Connecticut wage and hour law, allowing union to sue for overtime compensation due its members; by the test of associational standing applied, it is irrelevant whether or not the union serves as the employees’ collective bargaining agent).

fundamental fairness), but section 16(b) evidences a trade-off which, in terms of policy, is broadly applicable. That is, it would deny fundamental fairness to permit an employer to rely upon a set of arbitration rules that preclude both judicial access to class claims *and* the ability of employee representatives efficiently to aggregate those claims in arbitration.⁴⁶

The assumption of the Court's proceeding as it has in *Gilmer/Circuit City*, in making a bargain with the sponsoring corporation, is based on the latter's affording a *better* availability of an efficient and inexpensive process to resolve the claims of low wage workers, often small claims unlikely to be heard in the civil litigation system. As the Supreme Court has opined, the ability to aggregate just these kind of claims, and so to notify those who might wish to assert them were they to be informed, is an

46. In *Adkins v. Labor Ready, Inc.*, *supra* note 27, the federal district court held that the individual's agreement to submit "any disputes arising out of . . . [his] employment" to arbitration precluded a judicial group action under § 16(b) of the FLSA. In so holding, however, the court opined in *dictum* that the inability to bring a group action *in the arbitration* did not render the agreement to arbitrate unenforceable, 185 F. Supp. 2d at 644 (citing *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000)); and, the court further opined that it could not order a "class action arbitration unless the arbitration provision *permits* the maintenance of class actions," *id.* at 646, n.15 (emphasis added) (citing *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995)), using "permit" to mean "expressly to authorize."

These *dicta* are, to say the least, perplexing. The *Johnson* court held that the inapplicability of Rule 23 to an arbitration did not render the agreement to arbitrate unenforceable, even though the legislative histories of the commercial statutes involved indicated a congressional assumption that Rule 23 class actions would be readily resorted to in order to vindicate the statutory purposes. In other words, the decision in consistent with the theory of forum substitution, as not subjecting the arbitral forum to the Federal Rules of Civil Procedure (FRCP) *per se*. It says nothing about the possibility of group arbitrations, which are, for the reasons discussed above, readily to be distinguished from the complexities of Rule 23 class actions.

The *Champ* court, after reviewing authority, did indeed conclude that where an arbitration provision made no provision for class, group, or consolidated arbitrations, a court was precluded by the Federal Arbitration Act from ordering such. 55 F.3d at 275. *I.e.* that contractual silence works as a contractual prohibition to which the court was required to defer. But, the former assumption is not free from doubt, as Judge Rovner's dissent points out. Inasmuch as the assumption—that silence equals preclusion—rests on a theory of waiver, it is a very odd notion indeed that contractual silence works as a knowing and voluntary waiver not of procedural rules applicable only in federal court, but to a procedural right made part-and-parcel of the underlying statutory scheme.

The latter assumption, that a court must defer to such a preclusion, is more vexing. As we have seen, the courts would not defer to express procedural preclusions—e.g., limiting the choice of one's representative or foreclosing all discovery—where fundamental fairness would be denied. Thus, even were the *Champ* court correct in holding that Rule 23 was not made applicable by FRCP 81(a)(3) to employment arbitrations, that holding spoke not at all to the power of the arbitrator as a quasi-public actor to order opt-in notice where the interests of a full, economical, and expedited process would be served even though he or she is not bound by the FRCP.

important adjunct for achieving those very ends.⁴⁷ Inasmuch as a single group proceeding is far more efficient than presenting each case raising the same claim on the same facts *seriatim*, the employer is benefited by as full and final a disposition as the system can achieve. I.e., there is no principled ground for employers to resist affording employees notice and a right to opt in to the presentation of all group-based claims. Rules that would attempt to bar such a proceeding could only be predicated on an effort to atomize claimants, to weaken their ability to present their claims; such rules could not be countenanced as consistent with the assumption on which *Gilmer/Circuit City* rests.

To sum up the scope of employment arbitration, just as the rules cannot forbid numerous employees from asserting the same wrong in as many arbitrations, neither could they forbid those employees from asserting it in a single, common arbitration. Just as the arbitration rules could not deny an arbitrator the power to authorize discovery, as determined by the circumstances of the particular claim, neither could they deny the arbitrator discretion to use that device to facilitate the bringing of such a collective arbitration; and if that is so, neither could the rules deny discretion to authorize an opt in notice to the group similarly situated. Any effort to preclude that power would be an obstruction to getting claims heard cheaply and efficiently; it would be contrary to the very assumption on which the judicial bargain with employers rests and should render the system unworthy of judicial deference.

B. Unions as Legal Service Providers

The idea of unions as legal service providers is not novel.⁴⁸ Neither is the notion of a union pursuing a worker's or a group of workers' legal claims as part of its larger mission.⁴⁹ There are, however, two potential

47. See *Hoffman-LaRoche Inc. v. Sperling*, *supra* note 38, at 170:

A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

These benefits, however, depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.

48. See generally Robert Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991); Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992); Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 57 (Matthew Finkin ed., 1994).

49. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978) (demonstrating a union's willingness to pursue such claims).

obstacles to union assumption of the role of non-Labor Act employee representation under *Gilmer/Circuit City*: one legal, the other practical. The first is (or should be) readily disposed of; the second can be resolved only by experience.

The first attends to the holdings by two courts of appeals, contrary to the Labor Board, that commencing a lawsuit on behalf of employees that a union is seeking to represent constitutes the offer of a “gratuity” for voting for the union,⁵⁰ a form of “vote buying” that is disallowed by the Act. Whatever one thinks of this line of reasoning,⁵¹ it applies only to a lawsuit initiated as an organizational tactic and announced on the eve of a representation election. It would be inapplicable to the ongoing work of a legal representation plan, even if one purpose of the plan is eventually to secure a union foothold in the firm. It would also be inapplicable in any event if the system were organized as a pre-paid legal insurance plan geared to represent only those who have chosen to pay in.⁵²

The second potential obstacle is far more imponderable: Will the provision of arbitral representation be cost effective? And will it generate support for the union as bargaining representative?

On the first question, arbitral representation need not require an initial commitment of any considerable resources. Indeed, it is doubtful that a single employer would generate enough cases annually to sustain a system of arbitral representation limited to its employees, i.e., that it alone would sustain legal and other support staff devoted exclusively to that work on the basis of the attorney fees and expenses awarded in those cases.⁵³ It would be enough for a union to make its availability known to employees of employers that have adopted arbitration systems—by advertising, website, word-of-mouth, and otherwise—to counsel them about the legal rights they may be able to vindicate via these systems. For example, a union could inform to employees of such a company that anyone who believes he or she “has been discriminated against in pay or working conditions or harassed because of race, sex, religion, national origin, age, or disability, has not been properly compensated for overtime, has been wrongfully discharged, has been defrauded by misrepresentations by the employer or has had

50. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995); *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999).

51. A cogent critique has been supplied by Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 Berkeley J. Emp. & Lab. L. 57 (2002).

52. I.e., representation would not be a “gratuity.” *Freund Baking Co.*, 165 F.3d at 935.

53. The question of employers as “repeat players” in their own arbitration systems assumes, quite rightly, that such employers do generate numbers of cases, but thus far they tend to be relatively small numbers. See, Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997)(discussing employment arbitration as an emerging and controversial method for resolving employer/employee disputes).

wages wrongly withheld, has had his or her privacy invaded, has been subject to extreme and outrageous emotional injury, or any other legal wrong should contact 'X' Union for a free legal consultation."

Initially, the work could be assigned to incumbent union staff and counsel, and additional staff taken on as and if the work expands. If the staff member believed a case might have merit, he or she would address the company on the employee's behalf. If the company declined to engage in discussions with the union, or if those discussions proved unavailing, the union would proceed to arbitration under the employer's arbitration system as the employee's representative. The informality, lower cost, and speed of arbitration vis-à-vis litigation would encourage arbitrations to be brought.⁵⁴ The attorney fees generated by successful arbitrations, either as provided for by the statutes invoked, or taken on a contingent basis for state tort claims, might place the representation system on a self-sustaining basis.⁵⁵ Alternatively, if this preliminary sounding proves promising, the union could set up a legal consultation/representation insurance plan that would provide each plan participant (for a very modest fee) a set number of hours of legal consultation over workplace disputes, allowing the plan then to cherry pick the more promising cases—either for their intrinsic merit or their organizational value—to proceed to arbitration.

It is likely that, initially, employers will be unresponsive to union staff who approach them to resolve a complaint prior to noticing it for arbitration, but over time, recalcitrance should prove counterproductive. More likely, employers will attempt to resolve complaints brought by the union, especially those that, after investigation, seem meritorious or potentially vexatious. This should necessarily involve dealing with the union as the employee's representative. On the basis of that experience, one would expect the union staff to develop considerable expertise in the company's policies and practices—even about the idiosyncrasies of its managerial and supervisory personnel.

In effect, the union will have made itself an informal bargaining agent for those whose claims it takes up, individually or as a group, and the solutions it negotiates in grievance settlements could generate employer policies or practices that inure to the benefit of the workgroup or the

54. Theodore Eisenberg & Henry Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S93 (1997).

55. This is on the assumption that the representation of employees in the employer's arbitration system is not the practice of law even if lawyers are doing it. If such is the practice of law, the union could refer meritorious employees to a legal representation plan it has created. The fees would go to the plan, which would repay start-up costs back to the union as well as reasonable fees for the cases the union refers to the plan. *See, e.g.*, *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (deciding that a state court injunction that prohibited a labor union from advising injured members or their dependents to obtain legal assistance before settling claims was unconstitutional).

workforce as a whole. To the extent the union legal representation system is successful, the union will have become an active presence in the company on the employees' behalf.

The second imponderable is whether or not the credibility of the representation plan that will have built up over time with the companies' workforces can be translated into support for the union as collective bargaining representative. Successful organization (and subsequent bargaining) does not require overwhelming majority support at the outset; rather, it often depends on a cadre of workplace leaders who enjoy the respect of their co-workers.⁵⁶ Success in gaining damages for discharged workers who remain discharged and, even more, gaining reinstatement for unpopular, vexatious or incompetent co-workers will not build an indigenous leadership; but, gaining remedies for, or the reinstatement of, those who enjoy co-worker respect and who have leadership potential should conduce toward the creation of an influential in-plant organizing corps. Only experimentation and experience will demonstrate whether or not the transition from grievance representative to bargaining representative can be made.

II. THE UNION ROLE IN WORKPLACE SAFETY

Unlike the legal service model, where the union role, at least initially, is top-down, the role of the union in workplace safety is premised on bottom-up participation. We start with a truism: that "command and control" regulation may depend upon in-plant labor institutions for effective implementation. "In principle," Joel Rogers has observed,

a system that lodges responsibility for monitoring compliance with health and safety committees, who should be better informed about problems than government inspectors, and that gives those committees some authority to address problems should enlist the knowledge of regulated actors in finding ways in particular settings of satisfying publicly determined standards.⁵⁷

In other words, effectiveness depends on the employee participants being independent of managerial control and capable of functioning independently in terms of their education and training, in the knowledge

56. See Kate Bronfenbrenner & Tom Jurarich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in *ORGANIZING TO WIN*, Ch. 1 (Kate Bronfenbrenner et al. eds., 1998) (reviewing the literature). See also Lowell Turner, *Rank-and-File Participation in Organizing at Home and Abroad*, id. ch. 7.

57. Joel Rogers, *United States: Lessons From Abroad and Home*, in *WORKS COUNCILS* 375, 388 (Joel Rogers & Wolfgang Streeck eds., 1995).

and personal skills they are able to bring to the task.⁵⁸ A study of workplace safety committees in Oregon, in both unionized and non-union workplaces, shows the former far more effective than the latter (where they exist). The study states:

[S]afety and health committees can only go so far in a workplace that lacks an *independent* representative of the workforce. That is, union health and safety committees may be more effective at providing workplace public goods and lowering the costs associated with the exercise of rights by providing better protection against employer discrimination aimed at those who use those rights.⁵⁹

Thirteen states mandate the existence of workplace safety committees,⁶⁰ but these laws tend not to be implemented in non-union

58. See generally David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, (Nat'l Bureau of Econ. Research, Working Paper, 2001).

59. David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 INDUS. & LAB. REL. REV. 339, 358 (1999) (italics in original).

60. ALA. CODE § 25-5-15 (2001) (requiring the employer to appoint a safety committee including at least one non-supervisory employee to "advise" on workplace safety); CONN. GEN. STAT. § 31-40v (1997) (establishing health and safety committees pursuant to regulations issued by the Workers' Compensation Commission); MINN. STAT. § 182.676 (2001) (stating that "[e]mployee safety committee members must be selected by employees"); MONT. CODE ANN. § 39-71-1505(2) (a)(2001) (requiring committee to be composed of employee and employer representatives); MONT. ADMIN. R. 24.30.2542(4)(a)(i) (2001) (provides that employer representatives may not exceed the number of employee representatives); NEB. REV. STAT. § 48-443 (2)(b) (1998) (providing for an equal number of employer and employee representatives; employees may not be selected by the employer); NEV. REV. STAT. ANN. § 618.383 (Michie 2000) (requiring workplace safety committees); N.H. REV. STAT. ANN. § 281-A:64 III (2000) (demanding an equal number of employer and employee representatives and providing that employee representatives be selected by employees); N.C. GEN. STAT. § 95-252 (2000) (establishing that employer representatives are not to exceed the number of employee representatives with employee and employer representative co-chairpersons); N.C. ADMIN. CODE tit. 13, r.7A.0604 (June 2000) (implementing regulations are set); OR. REV. STAT. § 654.182 (1999) (requiring an equal number of employee and employer representatives); R.I. GEN. LAWS § 27-7.1-21 (2001) (authorizing the director to establish loss control standards that may require a safety committee); TENN. CODE ANN. § 50-6-502 (2001) (mandating an equal number of employee and employer representatives under rules to be prescribed; these are set out in considerable detail in chapter 0800-2-3 of the Rules of the Tennessee Division of Workers' Compensation); WASH. REV. CODE § 49.17.050 (Supp. 2000) (providing for rules establishing safety and health plans); WASH. ADMIN. CODE § 296-24-045 (2001) (provides accordingly for safety committees with employer representatives not to exceed employee representatives, the committee to elect its chair); W. VA. CODE ANN. § 23-2B-2 (Michie 1998) (authorizing the Commissioner of the Bureau of Employment to require a safety committee; W. VA. CODE ST. R. § 85-23-2 (2000)(the rules require at least fifty percent employee representation).

workplaces.⁶¹ Their implementation would open the door for unions to encourage, train and provide service to employee participants in non-unionized workplaces, better to realize the statutory end of improving workplace safety and health. Consequently, their implementation would also provide a potential platform from which a broader organizing effort later could be mounted once the union's credibility and value to the workers had been established.

Before seeing how this can be brought about, these laws must first be placed in juxtaposition with the National Labor Relations Act, to see whether and how the state and federal schemes can be accommodated. Section 8(a)(2) of the Act prohibits an employer from dominating or impermissibly supporting or interfering in the administration of a "labor organization."⁶² A labor organization is defined with extraordinary breadth as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁶³

The parameters of what constitute a statutory "labor organization" when it comes to dealing with safety issues are set by two decisions of the National Labor Relations Board.⁶⁴ In *duPont*, the employer established several safety committees composed of both managers and employees; management selected the employees from among volunteers and chaired the meetings. All decisions were to be made by "consensus," i.e., no decision could be made without managerial agreement.⁶⁵ The Board explained that the term "dealing with" describes a "bilateral mechanism" in which a group of employees makes a proposal and management responds; compromise is not required. This distinguishes "brainstorming" sessions and suggestion plans where no such interaction is contemplated.⁶⁶ It also distinguishes bodies vested with actual management authority: "[T]here would be no 'dealing with' management if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management."⁶⁷ In *duPont*, however, the course of "dealing" took place within the committee, not between the

61. David Weil, *Mandating Safety and Health Committees: Lessons from the States*, in PROCEEDINGS OF THE 47TH ANNUAL MEETING OF THE IRRA 273 (Paula Voos ed., 1995).

62. 29 U.S.C. § 158(a)(2) (2002).

63. 29 U.S.C. § 152(5).

64. Crown, Cork & Seal, Co., 334 N.L.R.B. 92 (2001); E.I. duPont de Nemours & Co., 311 N.L.R.B. 893 (1993).

65. *E.I. duPont*, 311 N.L.R.B. at 895.

66. *Id.* at 896.

67. *Id.* at 895.

committee and the managerial hierarchy; however, the Board explained that this was a distinction without a difference:

Each committee has management representatives who are full participating members [T]he Respondent's Personal Effectiveness Process handbook [s]tates: "consensus is reached when all members of the group, including its leader, are willing to accept a decision." Under this style of operation, the management members of the committees discuss proposals with unit employee members and have the power to reject any proposal. Clearly, if management members *outside* the committee had that power, there would be "dealing" between the employee committee and management. In our view, the fact that the management persons are on the committee is only a difference of form; it is not a difference of substance.⁶⁸

To Member Devaney, however, the touchstone was whether or not the employees serving on these bodies did so in a "representative" capacity.⁶⁹ Here, management selected and dealt with employees on the committee as "representatives" of their work groups or areas. To him, this was a necessary condition set out in the statutory concept that what is involved is an employee *representation* plan of some, or any, kind.⁷⁰

According to the Labor Board, *Crown Cork & Seal*⁷¹ presented an almost paradigmatic case of non-dealing as discussed in *duPont* (if the facts really are as the Administrative Law Judge found them): The plant was actually run by work groups, teams and committees, including safety committees, with delegated operational authority subject only to managerial review, rarely exercised.⁷² The safety committees, with both managerial and non-managerial participation, had the authority to review accident reports and to propose methods to ensure worker safety.⁷³ Interestingly, the General Counsel did not contend that a course of dealing took place between the management and "non-management" committee members.⁷⁴ Nor is there any suggestion that the "non-managerial" participants served in a representative capacity. On the contrary, in the Board's view, the committees "are management."⁷⁵ The Labor Board

68. *Id.* (emphasis in original).

69. *Id.* at 901.

70. *Id.*

71. 334 N.L.R.B. No. 92 at 4, slip op. (2001), available at <http://frwebgate.access.gpo.gov/cgi-bin/get-doc.cgi?dbname=nlr&docid=f:334-92.pdf> (last visited March 3, 2002).

72. *Id.* at 1.

73. *Id.*

74. *Id.* at 4.

75. *Id.* However, the Board reserved on the question of whether these "nonmanagerial" committee members are supervisors under the Act. *Id.* n.3.

concluded that these teams and committees performed managerial functions rather than dealing with management.⁷⁶

Accordingly, the critical distinction between the two kinds of safety committees lies in whether or not the employee participants speak only for themselves, and so serve “as management,” or represent their fellow workers and so “deal with” management. The Labor Board had earlier reserved judgment on the question of whether acting in a representative capacity is a necessary condition for finding that an employee group constitutes a labor organization.⁷⁷ Whether it is a necessary condition or not, there is no doubt at all that it is a sufficient condition of a finding of labor organization status.⁷⁸

Now on to these state laws. It is a basic principle of labor law preemption that a state may not command what federal law forbids.⁷⁹ If these state laws command the creation of *Crown Cork & Seal*-style safety committees, there would be no conflict with the Labor Act. But if these laws mandate the creation of committees in which employers deal with employee representatives over specified safety matters, then these bodies would be statutory labor organizations. In such a case, employers must avoid those acts that would constitute impermissible domination or interference under section 8(a)(2), for an employer is perfectly free to initiate⁸⁰ such a body under federal law so long as it does not dominate it or impermissibly interfere in it or support it.⁸¹

The Minnesota⁸² and Nevada⁸³ laws do not specify what the safety

76. *Id.* at 4.

77. See *Electromation, Inc.*, 309 NLRB 990, 994, n.20 (1992), *enfd* 35 F.3d 1148 (7th Cir. 1994).

78. See *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1120 (6th Cir. 1997). (finding a labor organization where there was evidence of representation).

79. The application of these laws to the unionized workplace implicates a different preemption problem. See, e.g., *Cannon v. Edgar*, 33 F.3d 880 (7th Cir. 1994). Suffice it to say, the fact that federal law preempts their application to unionized workplaces says nothing at all to their application in non-unionized workplaces where this element of federal preemption is inapplicable.

80. Devki K. Virk, Note, *Participation With Representation: Ensuring Workers' Rights in Cooperative Management*, 1994 U. ILL. L. REV. 729 (1994).

81. See generally Opinion of the NLRB General Counsel, *Goody's Family Clothing, Inc.*, No. 10-CA-26718, 1993 NLRB GCM LEXIS 67 (Sept. 21, 1993) (concerning the Tennessee law mandating the formation of safety committees). The Connecticut law specifies that the safety committees it mandates are not labor organizations within the meaning of the Labor Act. CONN. AGENCIES REGS. § 31-40v-11 (1999). The Connecticut Attorney General has opined that the law is not preempted because of this provision. Opinion of the Connecticut Attorney General, 1994 Conn. AG LEXIS 30 (Nov. 22, 1994). The Connecticut Attorney General is wrong. As will appear below, the statutorily mandated safety committees in Connecticut are labor organizations; but this does not mean that establishing them necessarily violates the Labor Act.

82. MINN. STAT. § 182.676 (2001).

83. NEV. REV. STAT. ANN. § 618.383 (Michie 2000).

committee is to do. Alabama⁸⁴ gives the safety committee authority to “advise” over workplace safety. The administrative regulations in Connecticut implementing the law provides that the committee has authority to establish procedures for “sharing ideas” about safety inspections, investigations, accident and illness prevention, and training.⁸⁵ Montana’s implementing regulations states that the safety committee acts as a “fact finding body” to report to the employer regarding hazards and training, to develop safety rules and policies, to educate (and communicate with) employees, to inspect the workplace and to review incidents.⁸⁶ Nebraska gives the committee the power to “adopt and maintain” a written injury prevention program. According to the applicable regulations, the committee “is limited to assisting the employer by making recommendations regarding methods of addressing safety and health hazards”; their recommendations are “advisory only.”⁸⁷ New Hampshire vests the “joint loss management committee” with authority to develop and carry out programs to encourage injured workers to return to work.⁸⁸ Tennessee and the rules adopted in Washington⁸⁹ give the safety committee authority to “assist” in establishing safety procedures in evaluating incidents. Three states are a little more categorical in terms of what the committee’s statutory duties are: They may establish procedures for inspections and investigations and evaluate programs (Oregon⁹⁰ and West Virginia⁹¹) and actually conduct inspections and engage in investigations of illness or injury (North Carolina⁹²).

In sum, most of these laws contemplate the safety committee as functioning in an advisory capacity, though some direct authority is conferred in North Carolina, Oregon, and West Virginia. However, that their function is advisory or operational says nothing at all at this point as to whether or not they are governed by the Labor Act. That is, an advisory or operational decision can be the product of consensus within a managerial body or of agreement between management and employee representatives as the result of a bilateral process, just as a union might strike a bargain with management for a joint safety committee with advisory or operational authority.

Accordingly, the applicability of section 8(a)(2) turns on whether the employee participants are intended by the legislation to represent only

84. ALA. CODE § 25-5-15 (2001).

85. CONN. GEN. STAT. § 31-40v-8 (1999).

86. MONT. ADMIN. R. 24.30.2542(4) (1996).

87. NEB. ADMIN. R. & REGS. 230-6-002(C) (2001).

88. N.H. REV. STAT. ANN. § 281-A:64 III (1999).

89. WASH. ADMIN. CODE § 296-24-045 (5)(a) (2001).

90. OR. REV. STAT. § 654.182 (1999).

91. W. VA. CODE ST. R. § 85-23-2 (2000).

92. N.C. GEN. STAT. § 95-252 (2000).

themselves while serving on management's behalf, as in *Crown Cork & Seal*, or whether they are intended to represent their fellow workers as in *duPont*. If the former, the company is free to adopt the *Crown Cork & Seal* model; if the latter, it must afford full employee independence in selection and in dealing with the management representatives on the committee and avoid "dominating" the committee or else violate section 8(a)(2). Consequently, analysis turns to the guidance these statutes give on that account.

A. *Managerial Participants or Employee Representatives*

Alabama requires an employer to "appoint" a safety committee upon the written request of any employee and provides that at least one member of it (of a minimum of three members) be a nonsupervisory employee.⁹³ Without more, this statute would not preclude the adoption of a managerial committee model (nor would Rhode Island, which makes no mention at all of who shall serve on the safety committee⁹⁴). All the other statutes speak in terms of employee "representatives" on the safety committee. Though different means of selection are set out, to be explored directly, it seems beyond cavil that, consistent with the research results showing employee independence to be an important factor in the ability of these bodies successfully to address workplace safety and health issues, these laws require that employee "representation" be of and by the employees independent of managerial control. Inasmuch as these laws require separate employee and managerial representation, they necessarily contemplate a course of dealing in the committee between these respective representatives. They are, thus, statutory labor organizations, and employers are required to observe section 8(a)(2) in implementing these state mandates.

Most of these laws address the question of how the employee representatives will be selected. Nebraska provides for the employer to seek "volunteers" through a written notice directed to all employees (if the number of volunteers exceeds the number of available slots, the seats will be filled by random selection from the volunteers; if not enough volunteers, the slots will be filled by random selection from the workforce).⁹⁵ Three states—Minnesota,⁹⁶ New Hampshire,⁹⁷ and Washington⁹⁸—provide that the employee committee members be "selected" by the company's

93. ALA. CODE § 25-5-15 (2001).

94. See R.I. GEN. LAWS § 27-7.1-21 (2001).

95. Neb. Admin. Code § 23—6.9(C) (2001).

96. MINN. STAT. § 182.676 (2001).

97. N.H. REV. STAT. ANN. § 281-A:64 III (2000).

98. WASH. ADMIN. CODE § 296-24-045 (2001).

employees; Tennessee says selected “from” the employees;⁹⁹ Oregon¹⁰⁰ and Montana¹⁰¹ speak in terms of volunteers or members “elected” by their peers. North Carolina¹⁰² speaks of selection by and from the workforce by election. Suffice it to say, if, by any of these means, the employer controls who the employee representatives are, it will have violated the Labor Act; if, however, it deals with employees selected independent of the employer, it will not.

Independence of action is necessary, but alone an insufficient criterion of conformity with the Labor Act, for even as employees may enjoy that independence in the committee, the committee as a whole, as a “labor organization,” must not be “dominated” by management. Several of the laws specify that management and employees will be equally represented on the statutory safety committee.¹⁰³ Connecticut goes further, to provide that the chair of the committee will rotate between employer and employee members;¹⁰⁴ North Carolina requires that there be employer and employee co-chairs.¹⁰⁵ It would seem a minimum condition of non-domination that the employee representatives at least equal the employer representatives, and be free to call meetings and to place any matter on the agenda subject to rules adopted by the committee. In addition, the employee representatives should be given access to information in the employer’s possession necessary for them to perform their statutory duties; should have the ability to communicate with the workforce by, for example, being supplied with a full list of employees, their job titles and home addresses; and should have the ability to draw on technical expertise from outside the firm. The state’s agency charged with enforcing these laws should assure that these requirements are met, as inherent in the mandated system of non-employer dominated workplace committees.

99. Rules of the Tennessee Division of Workers’ Compensation, 0800-2-3-.01, available at <http://www.state.tn.us/sos/rules/0800/0800-02/0800-02-03.pdf> (last visited April 8, 2002).

100. OR. REV. STAT. § 654.182 (1999).

101. MONT. ADMIN. R. 24.30.2542(4)(a)(ii)(2001).

102. N.C. GEN. STAT. § 95-252(d)(2) (2000).

103. CONN. AGENCIES REGS. § 31-40v-4(a) (1999); MONT. ADMIN. R. 24.30.2532(4) (1996) (providing that management representatives not exceed the number of employee representatives and that the committee may not be dominated by management); NEB. REV. STAT. § 48-443(2)(b) (1998); N.H. REV. STAT. ANN. § 281-A:64 III (1999); N.C. GEN. STAT. § 95-252(c)(2) (2000) (specifying that employer representatives may not exceed the number of employee representatives); OR. REV. STAT. § 654.182(1)(a) (1999); TENN. CODE ANN. § 50-6-502(a)(1) (2001); WASH. ADMIN. CODE § 296-24-045(1)(b) (2001) (providing that employer-selected members may not exceed number of employee-selected members).

104. CONN. AGENCIES REGS. § 31-40v-4(a).

105. N.C. GEN. STAT. § 95-252(c)(2).

B. Union Role in Implementing These Mandates

The laws in question provide for one of three ways for workers to choose their representatives on mandated safety committees: (1) by volunteers from the group; (2) by “selection” by the group; and, (3) by election. In the first group of states, a union could secure the volunteers from the workforce (which obviates any element of employer domination) and present them to the employer with an accompanying request for the employer to designate its representatives and to proceed apace to the committee’s work, as it is obligated to under state law. The employer’s reaction, however, might not be so cooperative; indeed, it might well be retaliatory. Inasmuch as the affected employees will have been acting for—as representative of—their fellow workers under state law, their actions would be concerted activity for mutual aid or protection under section 7 of the NLRA on even the narrowest reading of that Act,¹⁰⁶ and any retaliatory employer reaction would be an unfair labor practice remediable through the National Labor Relations Board. But more important, if the jurisdiction is one that recognizes the tort of discharge for a reason violative of public policy, retaliatory discharge against employees who have attempted to invoke state law would also be actionable under that head, in which proceeding compensatory and punitive damages, if allowed by state law, should be available. In other words, in addition to the remedies available under the Labor Act—of a cease and desist order and reinstatement with back pay—it is possible here for state law to serve as a significant (and, perhaps, more significant) deterrent to anti-statutory behavior.¹⁰⁷

The employer, chary of outright retaliation, might simply refuse to accede to the union’s request to appoint its committee members or substitute its “volunteers” for those submitted by the union. In the former

106. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); cf. *NLRB v. Esco Elevators, Inc.*, 794 F.2d 1078, 1079-80 (5th Cir. 1986).

107. The state’s action here would not be federally preempted. Federal law protects concerted employee activity for mutual aid or protection. State wrongful discharge law protects the individual from retaliation for a reason violative of the state’s public policy. In the latter, there need be no concert of action; in the former, the mutual aid sought may be over a matter of strictly private concern. In other words, the two may well overlap; but if that overlap were preemptive, no state whistleblower law could apply where more than one employee is involved and the subject matter over which the whistle is blown is a working condition of concern to the larger workforce. It may be that lacking the institutional presence of a union and the availability of a grievance-arbitration procedure to challenge retaliatory action, employee safety committee representatives will not be as independent of employer control as their counterparts are in unionized workplaces. See Clyde Summers, *supra* note 48, at 539. But the union presence here, even if more attenuated, coupled with the prospect of both Labor Act proceedings and tort litigation, combine to make these employees as independent as the law allows under present circumstances.

case, the employer should be subject to legal action to enforce the law (either judicially, if available, or upon administrative complaint)¹⁰⁸; in the latter, the employer should be subject to a charge of violation of section 8(a)(2), and the removal of the employer-chosen employee “representative.”

The situation in the second cluster of states is less clear: What, precisely, does “selection” by (or from) the workforce mean? It should suffice were the union to call a meeting of the employer’s workers and to run an election among them. Assuming a representative complement of the workforce to have appeared—a representative of the state agency authorized to administer the law might be invited to be present, to observe the election’s bona fides—there should be no doubt that a statutory “selection” by the workforce had taken place. The same legal recourse should be available here for employer retaliation or recalcitrance.

The statutory or administrative requirement of an “election” in the states so providing assumes two things: (1) the possibility of a contest; and, (2) the presence of a neutral agency to run the election. The administrative codes of these states do not as yet set out an election procedure; but, the union could request it on an ad hoc basis—by nominating a slate of committee members and asking the state agency to run an election—in the conduct of which the state should require that the names and addresses of the electorate be given it by the employer and to the union-nominated candidates.¹⁰⁹ Though non-union, or even anti-union candidates could run as well, employer nomination of or support for a candidate would fall afoul of section 8(a)(2).

One thread runs through all these scenarios: whatever the precise statutory formulation, unlike the National Labor Relations Act which, as currently interpreted, permits employers aggressively to oppose unionization, employer reaction to union efforts to implement these state laws must be measured by statutory strictures that do not allow that discretion. All these laws mandate that workplace safety and health committees with independent employee representation come into being.¹¹⁰

108. Where a private cause of action is not allowed, the strategy of union recourse to these statutes may have to rest on the relevant state administrative officers seeing that activity as concordant with and helpful to the implementation of the laws they administer. One could seek to mandamus a reluctant (or hostile) state administrator, but that would mean waging a two-front war. Some states provide for a fine or penalty for failure to implement the statutory mandate. Although this may argue against the creation of a private cause of action, these provisions need not be read to deny the relevant state agency the authority to enforce these requirements more effectively by other legal means.

109. Cf. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

110. Separate mention should be made here of California as a major jurisdiction with a somewhat different statutory approach. Its occupational health and safety law requires employers to adopt an injury prevention program. See CAL. LAB. CODE § 6401.7 (2002). The state’s standards board is authorized to permit the program to make provision for safety

As David Weil pointed out, however, getting a workplace safety and health committee in place with independent employee representation on it is a necessary, but insufficient condition for its success in improving those conditions. The employee representatives must be up to the task. Here the union could provide training and technical expertise (as needed) regarding the specific kinds of health and safety problems that are likely to or do develop in the particular workplace.¹¹¹ Their assistance should conduce toward the better realization in the plant, on the shop floor, of the standards of safety and health that society has mandated by law. The federal Occupational Safety and Health Act, for example, requires that “a representative authorized by” the employer’s employees be given the opportunity to accompany an OSHA inspector during a physical inspection of the workplace.¹¹² In the absence of a union, however, there is ordinarily no such representative,¹¹³ and the obvious benefit of having a knowledgeable employee independent of employer control accompany the inspector is lost. But there should be no doubt that an independent employee safety committeeman or committeewoman selected under state law meets the statutory criterion—as “a representative authorized” by the employer’s employees—and must be allowed to accompany an OSHA inspection.¹¹⁴ Retaliation against a committee member who seeks to perform that function would be actionable under OSHA,¹¹⁵ under section 7

committees: Their function is determined by the law and the board is authorized to specify the procedure for employee selection. *Id.* Section 17200 of the California Business and Professional Code authorizes any “person,” defined to include “associations and other organizations of persons”—that is, unions—acting for themselves, their members, or in the interests of the general public, to seek injunctive relief for any “unlawful . . . business act.” Unlawfulness, in turn, refers to any law. *McFetters v. Amplicon, Inc.*, 98 Cal. Rptr. 2d 63, 75 (Cal. App. 2000) (review filed) (law applies to wrongful employee dismissal). Consequently, where a non-union employer has made provision for safety committees in its injury prevention plan, a union would have standing to enforce the provision without recourse to the state administrative agency. *Cf. Coretz v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 715 (Cal. 2000).

111. The employee-participants’ ability to draw on that expertise and that they do so in fact is an index of their independence under § 8(a)(2).

112. 29 U.S.C. § 657(e) (1999).

113. The Department of Labor’s Rules provide that inspectors

shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees for the purpose of this section. If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

29 C.F.R. § 1903.8(c) (2000).

114. OSHA could secure a court order enforcing its administrative warrant authorizing the inspection to be accompanied by the employee representative. *See, e.g., Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334, 339 (7th Cir. 1995).

115. 29 U.S.C. § 660(c)(1) (1999).

of the Labor Act, protecting concerted activity for mutual aid or protection, and under state tort law of wrongful discharge as well.

Given the legal mandate for employee participation, given employees interested, intellectually equipped, and willing to serve, and given the independence and expertise that union assistance to them can provide, it would be to the employer's interest—both economically and in terms of industrial relations—to cooperate with them in the reduction of workplace illness and injury. To the extent the union's partnership in the safety committee, its provision of advice and assistance, is successful, it would have access to the workforce and an active indigenous leadership with a track record on safety concerns that may give it purchase on employee support as a collective bargaining agent. On the other hand, employer retaliation would trigger both federal and state remedial action, and employer recalcitrance or foot-dragging would not only trigger administrative or judicial proceedings, but also would foment bad employment relations on a very sensitive issue around which employee support for the union in a larger organizing effort might well gel.

III. CONCLUSION

It may be that Freeman and Rogers are wrong: that America's workers want neither more protection for their legal rights at work, nor independent participation in more effective systems of assuring workplace safety and health. But the means to test whether they do or not lie ready to hand. In a coordinated effort, unions could target a set of specific employers—for employee arbitral representation and, in statutorily hospitable jurisdictions, for employee safety committee participation—on a pilot basis, to learn if and how these devices work or can be made to work. The project could prove unpopular or cost ineffective and so be abandoned. Or, it could prove to fill a real need in a cost-effective manner and so be expanded, even to seeking workable safety committee legislation in the states currently lacking them. The decision to proceed or not is a challenge to the willingness of unions to be open to forms of employee representation by union initiative outside the National Labor Relations Act.